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NO. 1-452

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In The

SUPREME COURT OF THE UNITED STATES

PARADISE VALLEY UNIFIED SCHOOL DISTRICT,

Petitioner,

vs.

LINDA JOHNSON,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent, Linda Johnson, by and through her attorney undersigned requests that this Court deny the Petition for Certiorari filed by Petitioner Paradise Valley Unified School District, seeking review of the decision of the Ninth Circuit entered in this case on May 24, 2001. The Ninth Circuit denied a Petition for Rehearing on June 19, 2001. Petitioner Paradise Valley Unified School District filed the Petition for Writ of Certiorari on or about September 14, 2001.

COUNTER-STATEMENT OF THE CASE

Respondent, Linda Johnson, was employed with Paradise Valley Unified School District as a Custodian I from August 23, 1982 to July 27, 1987. She was promoted to the position of Groundskeeper I, and held that position from July 27, 1987 to April 13, 1989. On April 13, 1989 she was promoted to the position of Groundskeeper II. She held that position until May 14, 1996. On Sunday, July 9, 1995, a golf cart severely damaged Linda Johnson's left leg while she was working for Paradise Valley Unified School District. She needed surgery to repair her leg.

Dr. Kevin Ladin testified that Respondent severely injured her leg and had severe problems with pain in her leg, subsequent to July 9, 1995. He testified on February 15, 1999 that Respondent sustained a degloving type injury in which her leg was crushed and the skin was pulled away from the leg, exposing muscular tissue and resulting in nerve damage. Respondent had surgery and she was placed on medication to relieve her pain. Dr. Ladin testified Linda Johnson

complained of ongoing problems with pain of a burning quality and some intermittent sharp stabbing lancinating pain. He testified within a reasonable degree of medical probability, Respondent, Linda Johnson could have done the job of Groundskeeper with modified restrictions on February 6, 1995.

Respondent Linda Johnson testified that after her injury she spoke to Teri Traaen, Director of Employment, who gave her a slip to go on Industrial Workman's Compensation. Respondent testified that she told Teri Traaen "the electric cart crushed my leg and tore the skin, muscle, and all the tissue off my leg. I was on crutches because I had to keep weight off my foot because it was swelling, and I told her that . . at that time that I didn't know if and when I'd ever be able to come back to work". She testified that she was wearing shorts and Teri Traaen could see her leg. Respondent was not able to walk on her leg.

On February 5, 1996 Respondent received her limited release to go back to work from Dr. Kevin S. Ladin. She went to the school district and saw Teri Traaen, Director of Employment. Ms. Johnson testified that she gave Teri Traaen the modified release "[a]nd Teri looked at me and said "we couldn't do this: 'we don't take limited releases' and I said - - then I went home". Although Petitioner admitted in its Answers to Interrogatories, Joint Pretrial Statement, and in the Answer to the Complaint that they had received the modified release, at trial they denied ever seeing it. Respondent in her statement of the case seems to admit receiving the release by stating that there were significant limitations on the release.

On May 13, 1996 Respondent Linda Johnson had a meeting with Director of Employment Teri Traaen. She had been off of work for more than 100 days. Respondent

brought a note requesting a one year leave of absence due to complications of her injury. It was the policy of the school district to allow an employee to utilize their accrued vacation time and sick time to cover periods of absence. Ms. Traaen told her she would not give her this leave. Ms. Johnson requested to use her accrued vacation and sick leave benefit time to extend her time off of work, and Ms. Traaen said "no". Ms. Traaen told Respondent she had to resign or be fired. Respondent testified that she told Teri Traaen that she didn't want to resign and had never been fired in her life. She testified she told Ms. Traaen she wanted her job. It wasn't her fault that she was injured. Respondent Linda Johnson testified that Teri Traaen told her that after she received a full release from her doctor, she could reapply for another job. Respondent Linda Johnson testified that she told Teri Traaen she wanted to think about the matter. She said she went into the reception area and saw a co-worker, Ms. June Kaiser. She testified she was upset and crying and she told Ms. June Kaiser "Teri Traaen is making me resign or she's going to fire me". Ms. June Kaiser also testified to this conversation. She testified that Linda Johnson told her she had to resign or be fired.

Ms. Johnson testified that on May 13, 1996, she went home and had a conversation with her husband, Larry Johnson, and Mr. Nidal Melhem, her daughter's boyfriend, about the matter. She said that she told them "They are making me resign or be fired". She told them that Teri Traaen told her a resignation would look better on a new application than a termination.

Larry Johnson and Nidal Melhem also testified before the jury. Both testified there was a conversation with Ms. Linda Johnson on the evening of May 13, 1996, at which time she told them that she had to make up her mind as to whether or not she would resign or be terminated. Respondent Linda

Johnson testified she saw Ms. Traaen the next morning. Ms. Traaen asked if she had a full release. Ms. Johnson said, "no", and Ms. Traaen replied, "Well, you have to resign or be fired." Ms. Johnson resigned. The resignation letter was typed with the date of May 13, 1996, but Linda Johnson signed it putting the date May 14, 1996, under her signature.

Director Employment Teri Traaen testified to a different set of facts regarding her meeting with Linda Johnson on May 13, 1996. Director of Employment Teri Traaen testified that on May 13, 1996, she had a meeting with Respondent Linda Johnson and that Respondent Linda Johnson opened her purse and showed her all of her prescription medicine and told her that she was in great pain and would never work again. Ms. Teri Traaen testified that Linda Johnson made the following statements to her in this meeting:

A. My inquiry first off was to say to Ms. Johnson, 'How are you? What is the status of your situation? How are you feeling?' Just a general inquiry into her well-being.

Q. And what was her response?

A. Her response was, you know 'terrible. I'm in constant pain' and I was, I think, a little taken back by that, but certainly when an employee self reports that, there is not a way to dispute it and I don't know that I would have even attempted to dispute that.

Q. Okay.

A. Her next effective gesture or response was to pull open her purse that she had with her and say, 'I'm on medication all the time for the pain.' And we were sitting at a round table in my office, and as she pulled open her purse, there were approximately half a dozen pill bottles in the purse, and they appeared to be covering anything else that was perhaps in the lower portions of that receptacle. I remember thinking, my goodness, you know, that's a lot of medication to be on. And I said, 'Well, what are you thinking, you know, what's your situation?' Because again, there was nothing, no paperwork provided by Ms. Johnson at that point, just this admonition ad, 'I'm in constant pain all the time.' And she said, 'Well, I don't know. You know my leg is just hurting all the time.' (CR 189, testimony of Traaen, February 18, 1999, p. 167, l: 21 - 169, l: 5).

Teri Traaen testified that Linda Johnson said "You know, I don't know see how I can ever work again. I'm in constant pain. On cross-examination, Ms. Traaen once again confirmed that Linda Johnson stated that she was in constant pain and would never work again and that Ms. Traaen made a note to that effect. Teri Traaen wrote in her notes "constant pain", "never work". Director of Employment, Teri Traaen, testified Ms. Johnson's pain looked genuine and she had no reason to doubt the statements that Respondent not in constant pain and could never work again. Director of Employment Teri Traaen testified that Respondent quit her

position. At trial Teri Traaen testified that she never told any employee that they would have to have a full release or be terminated. Dan Gallagher, Groundskeeper, and Jay Brewer, Groundskeeper, testified that Director of Employment Teri Traaen had told them after they were off of work for 100 days, if they did not have a full release to return to work, they would be terminated.

Respondent received a full release to return to work on June 3, 1996. Both before and after she received the full release, she applied for open positions at Paradise Valley Unified School District. She applied for at least 13 positions. She applied for a broad range of jobs including, but not limited to, positions of Maintenance Technician, Groundskeeper I, General Maintenance Worker, and Groundskeeper II. She was never called or interviewed for any of these positions. All of her applications were marked "DNP" or "Do Not Process".

Respondent was clearly qualified for the positions of Groundskeeper I and Groundskeeper II. She had held the position of Groundskeeper I from July 27, 1987 to April 13, 1989, and the position of Groundskeeper II from April 13, 1989 up until May 14, 1996.

James Jurs is the Superintendent of the Paradise Valley School District. A portion of his deposition was read to the jury. In it, he admitted under oath that Linda Johnson should have been considered for any job that she applied for subsequent to the time that she got a full release from Dr. Ladin.

Ms. Teri Traaen, Director of Employment, testified she was involved in the decision to put "DNP", or Do Not Process, on the 13 applications of Linda Johnson. She testified that Respondent's applications were marked Do Not

Process because of an incident in which Linda Johnson appeared in the lobby in a rage. On cross examination, Ms. Teri Traaen admitted that she was placing "DNP" on the applications of Linda Johnson even before the incident in which Ms. Linda Johnson allegedly appeared in the lobby in a rage. Other witnesses, Ms. June Kaiser and Ms. Linda Haze, testified that they were working in the area in which Respondent allegedly was enraged. They testified they never saw Linda Johnson in the lobby in a rage. Ms. Linda Johnson denied ever being in the lobby in a rage.

Ms. Teri Traaen then testified that she put "Do Not Process" on the application of Linda Johnson because of her attendance problems. Respondent's job performance evaluations were introduced as Respondent's Exhibit 4-17. All of her overall ratings are "meets standards" or "exceeds standards". Respondent had never been disciplined for her attendance. At trial, through cross examination, Ms. Teri Traaen testified that Respondent was absent after her injury on July 9, 1995. There was an inference through the testimony that the only attendance problems Respondent might have had might be as a result of the disability she had from her injury suffered on July 9, 1995.

Respondent Linda Johnson contended before the jury that Director of Employment Teri Traaen had violated the Americans with Disabilities Act by failing to allow her to return to work with a limited release on February 5, 1996 because she perceived her as having a disability, by failing to allow her to use her accrued vacation or sick time to extend her leave of absence as was the policy of Paradise Valley Unified School District on May 13, 1996 because Ms. Traaen perceived Respondent of having a disability, by coercing Respondent into resigning causing a constructive discharge on May 14, 1996 because Ms. Traaen perceived Respondent as having a disability, and by failing to hire Respondent in any

of the 13 positions that she applied for subsequent to May 13, 1996 because of her perceived disability.

PROCEEDINGS BELOW

On February 22, 1999 the jury returned a general verdict in favor of Respondent Linda Johnson on her claims that there were violations of the Americans With Disabilities Act. Defendant Paradise Valley Unified School District moved for a judgment as a matter of law at the close of Respondent's case before the trial court judge, Judge Van Sickle. This trial court judge had been present throughout the testimony of the witnesses and the entire proceeding. He denied Petitioner's motion. Subsequently, Judge Van Sickle was unable to continue presiding over this case and other cases. Petitioner filed a motion for a judgment as a matter of law. The case was reassigned to Judge Sedwick from Alaska. He did not have a complete trial transcript of the proceedings. He granted Petitioner's motion for judgment and reversed the jury verdict. Respondent filed an appeal with the Ninth Circuit. The Ninth Circuit held Judge Sedwick abused his discretion. It stated, "It is not the province of the court to spin such evidence in an employer's favor when evaluating its motion for judgment as a matter of law". The jury's verdict was supported by substantial evidence. Even Judge Sedwick had found that there was evidence to support an inference that Director of Employment Teri Traaen believed Respondent Linda Johnson was disabled within the meaning of the Americans with Disabilities Act. This admission and a careful review of the trial transcript led the Ninth Circuit to reinstate the jury verdict.

REASONS FOR DENYING THE WRIT

1. **There is no compelling reason to grant the Writ of Certiorari.**

There is no compelling reason to grant the Writ of Certiorari. Rule 10 of the Rules of the Supreme Court of the United States provides, "Review on a Writ of Certiorari is not a matter of right, but of judicial discretion. A Petition for a Writ of Certiorari will be granted only for compelling reasons". Those include important novel or reoccurring questions or conflicting decisions in the courts. A decision to grant certiorari represents a commitment of scarce judicial resources. Rule 10 states, "A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The instant case is merely a factual dispute between the parties. It does not involve a major legal question nor does it involve a conflict between the circuits. The decision of the Ninth Circuit was correct. There is substantial evidence to support the jury's verdict.

2. **The Ninth Circuit's opinion is not contrary to the United States Court's decisions as is stated by Petitioner in their Writ of Certiorari.**

The Ninth Circuit's opinion is not contrary to the United States Court's decisions as is stated by Petitioner in their Writ of Certiorari. Petitioner begins its Writ of Certiorari by insinuating that the Ninth Circuit did not review the trial transcript to determine if there was substantial evidence to support the jury's finding of a violation of the Americans With Disabilities Act. In the Writ of Certiorari, Petitioner claims that the Ninth Circuit applied the jury instructions as the rule of law in the case. It did not. It

recognized that Respondent's claim concerned the major life activities of walking, working, and standing. (Petition for Writ of Certiorari, *App.8a*). Linda Johnson had an injury that severely injured her left leg. She was on pain medication. She could not walk on her leg. She could not stand on her leg. The Ninth Circuit also considered whether or not there was substantial evidence for the jury to conclude that Respondent was substantially limited in the major activity of working in a class or broad range of jobs, even though that was not the jury instruction. It stated:

> Moreover, there is substantial other evidence from which the jury could have concluded that the District regarded Johnson as disabled from a class or broad range of jobs. That evidence includes the undisputed fact that the District refused to consider her for thirteen different maintenance and groundskeeping jobs. It also includes the testimony that the District enforced a policy of refusing to accept "partial releases" for employees in any job category; that policy supports an inference that the District regarded Johnson, and other injured employees, as unable to perform any job. See, *McGregory v. National R.R. Passenger Corp.*, 187 F.3d 1113,1116 (9th Cir. 1999) ("A '100% healed' or 'fully healed' policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is '100% healed' from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation".) (Writ of Certiorari, *App. 12a.*)

The Ninth Circuit clearly evaluated the case to determine whether there was substantial evidence to find a limitation in the major activity of working in a class or broad range of job as is evidenced by the quote from the Ninth Circuit stated above. The Ninth Circuit did not rely on jury instructions rather than correct legal standards contrary to any United States Supreme Court decision. The Ninth Circuit correctly applied *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 490, 119 S.Ct. 2139 (1999).

Petitioner Paradise Valley Unified School District argues that the Ninth Circuit has made a ruling in conflict with the other circuits. Contrary with this assertion, Respondent then admits in *Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176, 183 (9th Cir. 1989), cert. denied, 493 U.S. 1058 (1990).* The Ninth Circuit ruled jury instructions are not the law of the case with respect to rulings on motions to judgment as a matter of law. The United States Supreme Court should not accept Writ of Certiorari in this case.

3. **The Ninth Circuit's opinion does not create a split with the other circuits.**

The Ninth Circuit's opinion does not create a split with the other circuits. Each case depends upon it's own facts. It is not possible to group cases in which courts have granted motions for summary judgment as establishing a conflict among the circuits. Respondent Linda Johnson had more evidence to support her claim than that referenced by defendant in their Writ of Certiorari. Respondent insinuates that the only evidence Linda Johnson had to support her ADA claim was Director of Employment Teri Traaen's "mere knowledge" of her physical impairment. All of the cases cited by the Responded involved the granting of motions for summary judgment and not jury verdicts. The 7th

Amendment to the Constitution protects the right to a trial by jury. Jury verdicts are not to be taken lightly. A trial court judge may not substitute belief for the finding of a jury. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2110 (2000); *Gilbrook v. City of Westminster*, 177 F.3d 339 (9th Cir. 1999). Respondent Linda Johnson had a severe injury to her leg accompanied by severe problems with pain. She had surgery and was placed on medication to relieve her pain. She continued to have ongoing problems with pain of a burning quality and some intermittent, sharp, stabbing lancinating pain. She was unable to walk on her leg. At the time that she had a modified release to return to work, Director of Employment, Teri Traaen, refused to accept the modified release stating, "We don't take limited released". Subsequently on May 13, 1996 Director of Employment Teri Traaen refused to allow Respondent to utilize her accrued vacation time and sick leave to cover her absence, and coerced her into resigning. According to Ms. Teri Traaen, Linda Johnson, during this meeting, opened up her purse, showed her approximately a half a dozen pill bottles, and said, "I'm in constant pain all the time." . . . "You know my leg is just hurting all the time." . . "You know I don't see how I can ever work again. I'm in constant pain." Director of Employment Teri Traaen testified she accepted these statements as facts. This then became her perception. She wrote "constant pain" and "never work" on her note pad.

The ADA prohibits discrimination against a "qualified individual with a disability". 42 U.S.C. 12112(a). The definition of disability also encompasses those who have a "record of such impairment:" or are "regarded as having such an impairment". 42 U.S.C. 12102(2); *Sutton v. United Airlines, Inc.*, supra; *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999). "Disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities of an individual." 42 U.S.C. §

12102. One or more major life activities includes working in a broad class or range of jobs, walking, or standing. 29 CFR § 630.2(1). Director of Employment Teri Traaen is testifying as to her perception of Respondent's disability. Out of her own mouth she testifies that she perceives Respondent as being in constant pain and never able to work again. She denies ever seeing the modified return to work release, even though Petitioner has admitted in its Answers to Interrogatories, Joint Pretrial Statement, and Answer to the Complaint, that Petitioner did indeed receive the modified return to work release. Teri Traaen refused to allow Linda Johnson to return to work with a limited release. She then violates the School District's policy by refusing to allow Linda Johnson to use her accrued vacation time and sick leave to cover her absence. She coerces Linda Johnson into resigning. Subsequent to Respondent's resignation, Director of Employment Teri Traaen wrote "Do Not Process" on each of the thirteen applications of Linda Johnson. The Ninth Circuit held that Director of Employment Teri Traaen's explanation for writing "Do Not Process" on the applications of Linda Johnson could be used as evidence of pretext and support the disability claim. The Ninth Circuit stated:

> Indeed, Traaen's arguably pretextual explanations themselves could appropriately be considered as affirmative evidence of the District's motivation in rejecting Johnson's applications. As the Supreme Court recently remarked:
>
> > Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. . . . In appropriate circumstances, the trier of

> fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principal of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt.

Reeves, 120 S.Ct. At 2108. Similarly, finding pretextual an explanation for an adverse employment action can affirmatively support the conclusion that the employer was dissembling to cover up the fact that it regarded the employee as disabled.

> The district court's conclusion, in short, depended on that court's improper usurpation of the jury's basic fact-finding authority, including the authority to draw inferences from the facts established and to believe some witnesses but not others. Although the evidence was far from overwhelming, and the jury was not compelled to conclude that Traaen regarded Johnson as disabled, neither can it be said that the jury's conclusion to that effect was unsupported by substantial evidence. (Writ of Certiorari, App. 13a - 14a).

The Ninth Circuit has not split with other circuits. The Ninth Circuit has not held that mere knowledge of a disability alone is substantial evidence to support a claim of perceived disability under the Americans With Disabilities Act. The Ninth Circuit has reviewed the trial transcripts and found substantial evidence to support the jury verdict.

CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

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